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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 01.08.2006

CORAM

THE HONOURABLE MR. JUSTICE M.JEYAPAUL

C.M.S.A. NO. 13 OF 2006
AND
C.M.P. NO. 5467 OF 2006

Pinna Thevar .. Appellant/3rd Party

- Vs -

1. M.S.Maniam
2. S.Jayaseelan .. Respondents/Plaintiff and Defendant

For Appellant : Mr. R.Subramanian

For Respondents : Mr. Srinath Sridevan for R-1
No Appearance for R-2

Appeal filed against the judgment and decree dated 31.1.2006 in C.M.A. No.13 of 2005 on the file of the District Court, Nagapattinam against the order dated 5.7.2005 made in E.A. No.70 of 2004 on the file of the Addl. Sub Court, Nagapattinam, as stated therein.

ORDER

The appellant herein filed an application in his capacity as third-party in E.A. No.70/04 in E.P. No.108/04 in O.S. No.159/03 under Order XXI Rule 58 and Order XXXVIII Rule 8 of the Code of Civil Procedure to remove the attachment made in the suit property. The said petition was dismissed by the Execution Court as against which C.M.A. No.13/05 was preferred before the District Judge, Nagapattinam. A concurrent verdict was recorded by the appellate Judge in C.M.A. No.13/05. The petitioner herein, who is a third-party to the trial proceedings and has lost his plea to raise the attachment, both before the trial court as well as before the appellate court, has come forward with the present appeal.

2. The suit was filed by the first respondent herein as against the 2nd respondent on 21.10.03 for recovery of a pro-note debt from the 2nd respondent. On the very same day, notice was ordered in I.A. No.421/03 in O.S. No.159/03 directing the 2nd respondent to furnish

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security for the said amount. As the 2nd respondent did not furnish any security, an order of attachment was made on 14.11.03 and the order of attachment was effected on 25.11.03. Thereafter, the suit was decreed in favour of the first respondent. Based on such decree obtained by the first respondent, E.P. No.108/04 was laid by the first respondent against the 2nd respondent.

3. The appellant, who is a third-party, filed an application to raise the attachment on the ground that he having entered into an agreement for sale way back on 5.11.02, clinched the sale transaction by way of a sale deed dated 21.10.03 in respect of the suit property. The order of attachment effected on 25.11.03, well after the execution of the sale deed in favour of the appellant based on the agreement for sale dated 5.11.02, will not bind the appellant. Therefore, the appellant has prayed for raising the attachment made, subsequent to his purchase, in the suit in O.S. No.159/03.

4. The execution court having observed that the very sale deed, Ex.P-1, alleged to have been executed on 21.10.03 based on the sham and nominal agreement for sale dated 5.11.02 has been created only for the purpose of defrauding the first respondent, who is the creditor of the 2nd respondent, refused to raise the attachment ordered in the suit.

5. The appellate Judge, having adverted to the provision under Section 64 of the Code of Civil Procedure and the alleged sham and nominal transaction of the 2nd respondent with the appellant, confirmed the order passed by the execution court.

6. Learned counsel for the appellant would submit that inasmuch as the sale deed itself was executed long prior to the order of attachment effected by the trial court in O.S. No.159/03, the said order does not bind the appellant, who is the purchaser of the property for valuable consideration from the 2nd respondent. Therefore, the attachment made subsequent to the sale effected in favour of the appellant will have to be raised.

7. Learned counsel for the first respondent would submit that the whole sale transaction in favour of the appellant by the 2nd respondent is void inasmuch as the appellant and the 2nd respondent had clinched the deal in order to defeat the interest of the first respondent, who is the creditor in the case. Referring to Section 53 of the Transfer of Property Act, 1882 and Order XXI Rule 58 (2) of the Code of Civil Procedure, learned counsel for the first respondent would submit that the sham and nominal sale transaction fraudulently made will have to be avoided.

8. Section 64 of the Code of Civil Procedure reads as follows :-

"S.64 (1) Where an attachment has been made, any

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> private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment."

9. Section 64 of the Code of Civil Procedure will apply only in a case where the attachment has been made prior to the sale of the property to a third-party. Here, in this case, it is found that the sale deed was executed on 21.10.03 and the same was registered on 27.10.03 whereas the order of attachment was passed on 14.11.03 and the same was effected only on 25.11.03. As the sale deed has already been executed and the same was registered long prior to the order of attachment, Section 64 of the Code of Civil Procedure will not apply to the facts and circumstances of this case.

10. The Court has to find whether Section 53 of the Transfer of Property Act, which reads as follows, would apply to the facts and circumstances of the case :-

> "53. *Fraudulent transfer* – (1) Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.
>
> Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.
>
> Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.
>
> A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transfer or shall be instituted on behalf of, or for the benefit of, all the creditors.
>
> (2) Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.
>
> For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made."

11. In the light of the aforesaid provision of law found in the Transfer of Property Act, the question that arises for consideration is whether the sole creditor whose interest was defeated can invoke

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the provision under Section 53 of the Transfer of Property Act to challenge the transfer effected by the judgment-debtor in favour of a third-party.

12. Way back in the year 1930, this Court has held in *(Pakkiri)* Mohideen Tharangan & Another – Vs – Muhammad Mustappah Rowther & Others reported in AIR 1930 Madras 665 that even if there is only one creditor, the act of the debtor in transferring his properties to a stranger with a view to secrete the same and defeat the creditor would be fraudulent and the transfer could be set aside if the transferee had notice of the circumstances and of the debtor's evil design.

13. In the instant case, the agreement for sale entered into between the appellant and the 2nd respondent, the power of attorney executed by the 2nd respondent in favour of the appellant to sell away the property after payment of material part of the consideration and the sale deed executed on the very day of the filing of the suit have been produced to show that even before the attachment was effected by the first respondent, the property of the 2nd respondent had been sold for valid consideration to the appellant herein.

14. Unless there is concrete evidence to the contra, we cannot presume that the 2nd respondent and the appellant would have come to know of the institution of the suit on the very day it has been presented before the court. When the execution of the sale deed and the institution of the suit have synchronised, the court has to presume that the appellant, even before coming to know of the institution of the suit by the first respondent against the 2nd respondent has clinched the deal with the appellant.

15. Even if the registration of the sale deed has been postponed, the registration of the document clothes sanctity on the sale deed from the date on which it has been executed. The Honourable Supreme Court in Hamda Ammal – Vs – Avadiappa Pathar & 3 others reported in 1991 (1) SCC 715 :: 1991 (2) LW 110 has authoritatively held that even if the sale deed was executed prior to the institution of the suit and the registration of the same had taken place long after the suit was instituted, the sale deed comes into operation from the very date of its execution, the moment the same was registered within four months from the date of its execution as contemplated under Section 23 read with Section 47 of the Registration Act.

16. The registration of the sale deed had taken place, in the instant case, long prior to the attachment being effected by the first respondent against the property of the 2nd respondent. As per the aforesaid authority pronounced by the Hon'ble Supreme Court, the sale deed executed and subsequently registered by the 2nd respondent

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in favour of the appellant has come into operation on the date when the suit was laid.

17. Though the learned single Judge of this Court in *(Pakkiri) Mohideen Tharangan's case* cited supra has held that even if the interest of one creditor has been defeated, he could approach the court under Section 53 of the Transfer of Property Act, the same has not been found as a good law by a Division Bench of this Court pronounced in M/s.Maxhemeijer Jr. (India) Private Limited - Vs - Zainub Bi reported in 1974 (1) MLJ 455. Interpreting Section 53 of the Transfer of Property Act, it has been held by the Bench thus :-

> "3. ..... It should be noticed that the section uses the words "to defeat or delay the creditors" and not "to defeat or delay the creditor". Consequently, in a suit instituted under Section 53 of the Act, the plaintiff must plead and prove that the transfer which is impugned by the plaintiff was effected with the intention to defeat or delay the creditors of the transferor generally and not to defeat or delay this particular creditor or that particular creditor. The fraud, for the purpose of this section consists of the intention to defeat or delay the creditors of the transferors. An intent to defeat or delay the creditors as a whole in the enforcement of this right is what is regarded as a fraudulent intent under this section. This requirement of the section is easily understandable, because the normal rule is, any person is entitled to deal with his property in any way he pleases and the restriction imposed on the said power of alienation is only by way of equity in favour of other persons and one such equity is that which is recognised in favour of the creditors of the transferor. The right of the creditors, taken as whole, is that the entire assets of the debtor should be applied in payment of demands of them or some of them, without any portion of it being parted with, without consideration or reserved or retained by the debtor to their prejudice. The test, therefore, to see whether a particular transfer falls within the scope of the section or not is whether the debtor intended to prejudice the creditors as a whole by parting with his property without consideration or by securing or reserving a benefit to himself."

Thus it is clear from the above said pronouncement of the Division Bench of this Court, one of the material ingredients to invoke the provision of Section 53 of the Transfer of Property Act is that no suit could be laid by a creditor whose interest alone has been

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defeated under Section 53 of the Transfer of Property Act to avoid a transfer on the ground mentioned in the section, but one of the creditors whose interest was defeated or delayed alone could file a suit. So plurality of creditors should have been affected to invoke the provision of Section 53 of the said Act.

18. The Division Bench judgment of our High Court has been subsequently followed by a learned single Judge of our High Court in *P.Srinivasan – Vs – Suseelabai & Others* reported in *1991 (2) LW 169*, wherein it has been clarified that the primary requisite to invoke the provision under Section 53 of the Transfer of Property Act is that the impugned transfer should be to delay or defeat the general body of creditors and not an individual creditor. It has been further clarified that in the absence of any plea that there were more than one creditor, then Section 53 of the Transfer of Property Act cannot be legally invoked.

19. Of course, way back in the year 1917, the Patna High Court in *Fakira Singh – Vs – Majho Singh & Another* reported in *AIR 1917 Patna 448* held that Section 53 applies even though only one creditor is defrauded and hindered in realising his debt. The aforesaid authority is quite in consonance with the pronouncement of the learned single Judge of our High Court in *(Pakkiri) Mohideen Tharangan's case*. But when the march of law has been well pronounced by the judgment of the Division Bench of our High Court and the same has been followed subsequently by a learned single Judge, the said law will have to be followed in letter and spirit.

20. The Honourable Supreme Court has observed, referring to the attachment before judgment made under Order XXXVIII Rule 5 of the Code of Civil Procedure, in *Hamda Ammal – Vs – Avadiappa Pathar & 3 others* reported in *1991 (1) SCC 715 :: 1991 (2) LW 110* as follows :-

> "2. ..... The above provision itself makes it clear that the attachment before judgment would be made where the court is satisfied that the defendant is about to dispose of the whole or any part of his property or is about to remove the whole or any part of his property from the local limits of the jurisdiction of court with the intention to obstruct or delay the execution of any decree that may be passed against him. Thus this provision would not apply where the sale deed has already been executed by the defendant in favour of a third person. A transaction of sale having already taken place even prior to the institution of a suit cannot be said to have been made with the intention to obstruct or delay the execution of any decree. It would be a

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different case altogether if a creditor wants to assail such transfer by sale under Section 53 of the Transfer of Property Act, 1882 (hereinafter referred to as 'the Act') on the ground of a fraudulent transfer. Such suit would be decided on totally different considerations in accordance with the provisions of Section 53 of the Act."

21. A passing reference is found in the aforesaid authority that the position would be totally different if a creditor chooses to attack the alleged fraudulent transfer by sale under Section 53 of the Transfer of Property Act, 1882. The issue whether one and the only creditor could invoke the provision under Section 53 of the Transfer of Property Act has not arisen in the said case and, therefore, no answer thereof has also emerged in the aforesaid pronouncement by the Supreme Court. Taking advantage of such a passing reference found in the said judgment of the Supreme Court, the first respondent cannot validly to submit that the Honourable Supreme Court has laid down the law that one and the only creditor, in the absence of any other creditors, could very well seek recourse to Section 53 of the Transfer of Property Act.

22. Section 53 of the Transfer of Property Act has become scarce to the first respondent. He can no more avail the said provision of law in the absence of any other creditors as contemplated under Section 53 of the said Act. Inasmuch as the sale deed has been effected even before the attachment before judgment was effected by the first respondent in respect of the property of the 2nd respondent and the first respondent being the only creditor in the absence of any other creditors as contemplated under Section 53 of the Transfer of Property Act cannot attack the transfer on valid grounds, the claim made by the appellant herein for raising the attachment is found to be fully justified and merits acceptance by this Court.

23. The execution court as well as the first appellate court have not applied their mind to the law laid down by this Court and, hence, the order of the first appellate court affirming the order passed by the trial court has to be set aside.

24. In result, this appeal is allowed and the order passed by the first appellate court in C.M.A. No.13 of 2005 affirming the order

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of the Sub Court, Nagapattinam, made in E.A. No.70 of 2004 is set aside. Consequently, connected miscellaneous petition is closed. However, there will be no order as to costs.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

GLN

To

1.The District Judge,
Nagapattinam.

2.The Addl. Subordinate Judge,
Nagapattinam.

+1cc to Mr.Srinath Sridevan,Advocate Sr 34291

+1cc R.Subramanian, Advocate Sr 34341

TEJ (CO)
km/28.8.

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